INDEX

	Page
MOTION TO DISMISS	1
MOTION TO AFFIRM	2
A. STATUTES INVOLVED	3
B. STATEMENT	6
C. ARGUMENT	9
(1) Appellant Seeks Only To Overturn The District Court's Findings Of Fact Which Are Fully Supported By The Evidence	10
(2) In Any Event, The District Court's Finding That The Alleged Anticompetitive Effects Of This Merger Are Clearly Outweighed By Its Effect In Meeting The Convenience And Needs Of The Community Has Not Been Seriously Attacked On Appeal And Requires Affirmance Of The Judgment Below	18
D. CONCLUSION	22
MOTION TO ADVANCE	22

TABLE OF AUTHORITIES

CASES:

Camp v. *Pitts*, 93 S. Ct. 1241 (1973)	16
First National Bank of Logan v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966)	14
First National Bank in Plant City v. *Dickinson*, 396 U.S. 122 (1969)	14
United States v. *Connecticut National Bank*, Civil No. 14583 (D. Conn., June 22, 1973)	11, 12
United States v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973)	10, 11, 12, 13
United States v. *First National Bancorporation, Inc.*, 329 F. Supp. 1003 (D. Colo. 1971), *aff'd mem.*, 410 U.S. 577 (1973)	11, 13, 16

Page

United States v. *Idaho First National Bank*, 315 F. Supp. 261 (D. Idaho 1970) 12
United States v. *First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969) 12
United States v. *First National Bank of Maryland*, 310 F. Supp. 157 (D. Md. 1970) 12
United States v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950) 12
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 17, 22
United States v. *Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970) 19
United States v. *Third National Bank in Nashville*, 390 U.S. 171 (1968) 18, 19
United States v. *United Virginia Bancshares Inc.*, 347 F. Supp. 891 (E.D. Va. 1972) 11
United States v. *Yellow Cab Co.*, 338 U.S. 338 (1949) .. 12
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 12

STATUTES:

The Bank Merger Act of 1966, 12 U.S.C. 1828(c), 80 Stat. 7 .....3, 6-7, 8, 18, 23

Clayton Act, Section 7, 15 U.S.C. 18, 38 Stat. 731, as amended 3, 6, 7, 8, 9, 10, 12, 18

Banking Act of 1933, 12 U.S.C. 36(c)(2), 48 Stat. 162..4, 14

Revised Code of Washington (RCW):

§ 30.04.230 .....5, 15
§ 30.08.020 .....4, 14
§ 30.40.020 .....4, 14

SUPREME COURT RULES:

Rule 13(1) 2
Rule 16(1)(a) and (c) 1, 2
Rule 34(2) 1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-38

UNITED STATES OF AMERICA, *Appellant*

v.

MARINE BANCORPORATION, INC., THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK, AND JAMES E. SMITH, COMPTROLLER OF THE CURRENCY, *Appellees.*

On Appeal From The United States District Court For The Western District of Washington

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM OR ADVANCE THE CASE FOR EARLY ARGUMENT

MOTION TO DISMISS

Appellee James E. Smith, Comptroller of the Currency, moves this Court under Rule 16(1) (a) to dismiss this appeal on the ground that the appeal was not taken in conformity to Rule 34(2) of this Court.

In undertaking to docket its appeal in this matter, appellant sought and obtained two extensions of time under the provisions of Rule 34(2).[1]

Rule 34(2) provides that an application for further time in which to docket an appeal "will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period." As appellant's second request for an extension of time in which to docket this appeal was made less than ten days before the end of the period set by the initial extension of time, it should have set forth reasons demonstrating the "extraordinary circumstance" required. This Rule contemplates the recital of facts from which it may be determined whether the rule is satisfied and the request may accordingly be granted. Yet, appellant sought to meet the requirements of Rule 34(2) merely by claiming an inability to comply with the ninety-day time limit for docketing an appeal under Rule 13(1). Clearly, Rule 34(2) does not allow an extension of time in which to docket an appeal as a matter of right, a result which would follow if unexplained inability to meet time limits were adequate grounds for extension.

This appeal has not been taken in conformity to Rule 34(2) and should be dismissed.

MOTION TO AFFIRM

Appellee Comptroller of the Currency (Comptroller) moves this Court under Rule 16 to affirm the judgment of the District Court on the ground that this

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[1] These applications are printed as Appendicies I and II to Motion of Marine Bancorporation, et. al., to Dismiss or in the Alternative to Affirm or Advance the Case for Early Argument. Unless otherwise indicated this Motion is hereinafter referred to as "App. Banks' Mot."; "P.T.O." refers to Pretrial Order; "Tr." to transcript; "Juris. Stat." to Jurisdictional Statement.

case does not warrant plenary consideration by the Court because the decision below does not raise important legal issues of recurring significance and no basis exists for disturbing the District Court's findings of fact and its conclusions therefrom.

A. STATUTES INVOLVED

Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c) (5) (B), provides in pertinent part:

> The [Comptroller of the Currency] shall not approve—
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged

also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

12 U.S.C. §36 provides in pertinent part, as follows:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) . . . and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks* (Emphasis added).

RCW 30.40.020 provides in pertinent part:

No bank or trust company shall establish *or operate* any branch in any city or town outside the city or town in which its principal place of business is located in which any bank, trust company or national banking association regularly transacts a banking or trust business, except by taking over or acquiring an existing bank, trust company or national banking association or the branch of any bank, trust company or national banking association operating in such city or town (Emphasis added).

RCW 30.08.020 provides in pertinent part:

(7) That for a stated number of years, which shall be not less than ten nor more than twenty years from the date of approval of the articles (a) no voting share of the corporation shall, without

the prior written approval of the supervisor, be affirmatively voted for any proposal which would have the effect of sale, conversion, merger or consolidation to or with, any other banking entity or *affiliated financial interest,* whether through transfer of stock ownership, sale of assets, or otherwise, (b) the corporation shall take no action to consummate any sale, conversion, merger, or consolidation in violation of this subdivision, (c) this provision of the articles shall not be revoked, altered, or amended by the shareholders without the prior written approval of the supervisor, and (d) all stock issued by the corporation shall be subject to this subdivision and a copy hereof shall be placed upon all certificates of stock issued by the corporation (Emphasis added).

RCW 30.04.230 provides:

A corporation or association organized under the laws of this state, or licensed to transact business in the state, shall not hereafter acquire any shares of stock of any bank, trust company or national banking association which, in the aggregate, enable it to own, hold or control more than twenty-five percent of the capital stock of such bank, trust company or national banking association: *Provided, however,* That the foregoing restriction shall not apply as to any legal commitments existing on February 27, 1933: *And Provided, further,* That the foregoing restriction shall not apply to prevent any such corporation or association which has its principal place of business in this state from acquiring additional shares of stock in a bank, trust company or national banking association in which such corporation or association owned twenty-five percent or more of the capital stock on January 1, 1961.

A person who does, or conspires with another or others in doing, an act in violation of this section

shall be guilty of a gross misdemeanor. A corporation that violates this section, or a corporation whose stock is acquired in violation hereof, shall forfeit its charter if it be a domestic corporation, or its license to transact business if it be a foreign corporation; and the forfeiture shall be enforced in an action by the state brought by the attorney general.

B. STATEMENT

This case was brought by the Department of Justice under §7 of the Clayton Act (15 U.S.C. §18) to enjoin the acquisition of Washington Trust Bank (Washington Trust) by The National Bank of Commerce of Seattle (NBC). Washington Trust is headquartered and operates in Spokane, Washington, and NBC is headquartered and operates in Seattle, Washington, and in certain other Washington localities. NBC does not, however, operate in Spokane, so that the two are not significant direct competitors. No issues concerning an unlawful actual or direct effect on competition were litigated in the trial court (Juris. Stat., p. 4, n. 1), and the allegations of illegality involve only potential competition.

Early in 1971 appellee banks sought prior written approval for the acquisition from the Comptroller of the Currency.[2] The Comptroller is the appropriate "responsible agency" under the Bank Merger Act of

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[2] During negotiations leading to the merger agreement upon which this application later was made, officers of the two banks discussed with the Comptroller's Office the feasibility of this acquisition. Among other things, the Comptroller recognized the procompetitive aspect of such an event, and the restrictive nature of Washington's branching statutes was discussed. See n. 10, *infra*, p. 17.

1966 [12 U.S.C. §1828(c) (2) (A)] to pass upon acquisitions when the resulting bank is to be a national bank, as in the instant case. Pursuant to Subsection (c) (4) of that Act, the Comptroller obtained reports on the competitive factors from the Attorney General, the Federal Reserve Board, and the Federal Deposit Insurance Corporation (F.D.I.C.).

In its report the Federal Reserve Board noted that existing competition was not substantial and that NBC could not establish a *de novo* branch in Spokane because of the State's restrictive branching laws. The Board concluded that the effect of the proposal on competition would be "adverse" (P.T.O. I, Exh. C). The word "adverse" when used by the Board means only that the effects of the merger on competition should be considered by the agency in analyzing the banking factors involved, and do not rise to the level of a Clayton Act violation (see definition of the word "adverse" as used by the Board, 12 C.F.R. 250.182).

The F.D.I.C. likewise concluded that the merger would not eliminate significant existing competition or any significant potential competition between the two banks through *de novo* branching (*id.*, Exh. D). Only the Attorney General's comments indicated a possible antitrust violation (*id.*, Exh. B). These were made without regard to the procompetitive effects of the merger benefiting the convenience and needs of the public, upon which the Comptroller relied. His opinion, approving the merger, was issued on September 24, 1971 (*id.*, Exh. D)

On October 22, 1971, appellant brought suit alleging *inter alia* that the acquisition would eliminate NBC as a significant potential entrant in the Spokane

metropolitan market.[2] Such elimination, appellant maintained, would violate the Clayton Act by lessening the potential competition presently exerted by NBC.

On December 7, 1971, the Comptroller intervened under the Bank Merger Act [12 U.S.C. §1828(c) (7) (D)]. The Comptroller generally denied appellant's allegations and alleged as an affirmative defense the provision of the Bank Merger Act whereby a merger may be held lawful, despite anticompetitive effects, if such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served [12 U.S.C. §1828(c) (5) (B)].

The case was extensively litigated. All parties conducted searching discovery involving written interrogatories, requests for production of documents and depositions under the Federal Rules of Civil Procedure. As trial neared, and in an effort to narrow the issues, the parties exchanged proposed pretrial statements containing offers of facts to be stipulated and their respective contentions of fact and law. These exchanges resulted in a stipulated pretrial order.

Other than documentary exhibits, the depositions of defendant banks' officials, and a rebuttal witness, the Justice Department's case focused on the testimony of

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[2] The parties stipulated and the Court below found as a fact that the Spokane Metropolitan area, as delineated by a map attached to the Pretrail Order (P.T.O., Exh. I), was the appropriate geographic market within which to determine the effects of this merger upon competition. Appellant also alleged other geographic areas, including the State of Washington, as being appropriate for use in such analysis. However, appellant's economist testified that such areas were not relevant markets in this case (Tr. 166-67), thus disposing of the issue.

one economist, Dr. Smith, a former employee of the Federal Trade Commission. Additionally, plaintiff called an expert on "urban economics" to describe the Spokane area in glowing terms, an expert in "recreation" who commented upon Spokane's proposed "Expo '74" fair, and the banking supervisor for the State of Alaska, who had formerly supervised Washington State banks. Plaintiff also offered the deposition of the late Chairman of the Board of Old National Bank of Washington.

Appellees moved to dismiss at the close of the plaintiff's case. Although he believed plaintiff's case to be "thin," the District Judge denied the Motion, crediting Dr. Smith's testimony as "some evidence" to support their case. The Court wished to hear the Comptroller's convenience and needs case so as to have all the evidence before deciding the matter (Tr. 620). At the close of trial, the Judge announced his decision from the bench and findings of fact and conclusions of law were made accordingly (Juris. Stat., p. 61-64).

Appellant now seeks to overturn the District Judge's findings of fact supporting his conclusion that the merger does not violate Section 7 of the Clayton Act.

C. ARGUMENT

There are no issues of law or fact of sufficient importance to warrant plenary review by this Court. The Department of Justice failed to prove that NBC was a significant potential entrant into Spokane and the District Court's finding on this point is amply supported by the evidence. Testimony of the Comptroller's Regional Administrator supporting this finding is a significant, and in effect, determinative factor underlying the Court's conclusion.

The judgment should be affirmed for the additional reason that the District Judge properly weighed the procompetitive convenience and needs factors against all anticompetitive effects alleged by plaintiff, which he assumed *arguendo* to have been proven. The Court's conclusion that these alleged anticompetitive effects are clearly outweighed in the public interest by the unchallenged procompetitive effects as found is determinative of this appeal.

(1) Appellant Seeks Only To Overturn The District Court's Findings Of Fact Which Are Fully Supported By The Evidence.

There is no question in this appeal as to whether the doctrine of potential competition applies to bank mergers. Decisions of this Court cited by appellant (Juris. Stat., p. 14) firmly establish such a doctrine under the Clayton Act. These decisions demonstrate that with sufficient proof the Department of Justice may show the elimination of substantial potential competition which may violate the Clayton Act. Thus, in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), this Court reiterated that Section 7 of the Clayton Act may be violated when the acquisition of a substantial firm in a given section of the country eliminates the acquiring firm as a significant potential entrant in that area.

Appellant undertakes to turn the factual question of whether NBC is a significant potential entrant into a question of law by claiming the District Court failed to apply "proper standards" in deciding this issue. The District Court's findings are attacked as turning on "subjective, self-serving statements" (Juris. Stat., p. 15), raising once again the argument that only so-called "objective" evidence should be considered. This

argument was put to rest by this Court's decision in *Falstaff* wherein Mr. Justice White pointed out that "the testimony of company officials about actual intentions of the company" was relevant and not to be looked upon with suspicion, although recognizing it was "not necessarily the last word." 410 U.S. at 534-36. Moreover, the District Court here plainly considered and relied upon many other factors, as shown below (pp. 13-14, *infra*).

Despite *Falstaff*, appellant suggests that *United States* v. *First National Bancorporation, Inc.*, 410 U.S. 577 (1973), *aff'g.* 329 F. Supp. 1003 (D. Colo. 1971) (hereinafter *Greeley*) influenced adversely the decisions in two recent potential competition banking cases, *United States* v. *United Virginia Bancshares Inc.*, 347 F. Supp. 891 (E.D. Va. 1972) and *United States* v. *Connecticut National Bank*, Civ. No. 14583 (D. Conn., June 22, 1973) (Juris. Stat., pp. 13-14, n. 6). On this basis the Department of Justice asks this Court for "guidance" (Juris. Stat., p. 13). The decision in *United Virginia*, however, was rendered nearly seven months prior to *Greeley* and could easily have been appealed.[4] Furthermore, the District Court in

[4] *Greeley* was decided February 28, 1973. Appellant asserts that *United Virginia* was decided against it on March 20, 1973 ("[f]ollowing this Court's decision in *First National Bancorporation*," Juris. Stat., p. 13, n. 6). However, the memorandum opinion in *United Virginia* ordering the merger approved is dated September 8, 1972. If Justice's concern is that *Greeley* created a question as to the applicability of the potential competition doctrine, this precise issue was raised by the District Court's opinion in *United Virginia*. Although basing his decision on the failure of plaintiff's proof, the Judge found applicability of the doctrine to banking somewhat "debatable." Appellant could have most appropriately sought Supreme Court review of that issue in *United Virginia* inasmuch as formal entry of judgment on the September 1972 decision did not occur until March 20, 1973, approximately one month after *Greeley*.

Connecticut applied the doctrine in a bank merger case, holding on the basis of *Falstaff* that the concept of potential competition was "valid" (Slip Op. at 114). The District Court in that case, as in the instant case, found that the Antitrust Division simply had failed to prove its case.[8]

As detailed below, appellant seeks "what virtually amounts to a trial *de novo* on the record. . . ." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949). There is no occasion here to depart from the Court's well-settled rule that the findings of a district court may not be overturned unless clearly erroneous. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States* v. *National Ass'n. of Real Estate Boards*, 339 U.S. 485, 495-96 (1950).

In short the potential competition doctrine has been recognized and accepted by district courts in bank merger cases. Its applicability was not challenged in the course of this case. There is no necessity, because

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[8] In general, district courts in potential competition bank merger cases have been concerned with the quantity of proof offered by the Department of Justice. As the District Court said in *United States* v. *Idaho First National Bank*, 315 F. Supp. 261, 266 (D. Idaho 1970), ". . . it is basic to *de novo* trial in federal district courts that every case be considered and determined in every court upon the specific facts found from the evidence presented in that particular case." And in *United States* v. *First National Bank of Maryland*, 310 F. Supp. 157, 186 (D.Md. 1970) the District Court noted that while defendants had borne their burden of proof in the convenience and needs defense by a wide margin, ". . . by an even wider margin plaintiff has failed to shoulder its Clayton Act burden." In *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1190-1191 (S.D. Miss. 1969), the Court recognized the potential competition analysis of the plaintiff's economist together with the necessity ". . . for this Court to factually determine whether Plaintiff has proved by a preponderance of the evidence that FNB Jackson is a probable *potential* competitor. . . ."

of *Greeley* or in spite of *Falstaff*, for this Court to undertake plenary review here to provide "guidance." As shown below, plenary review of this case would only serve to entangle this Court needlessly in matters of fact and local law inappropriate for its consideration.

The District Court's finding that NBC is not a potential competitor in the Spokane market is determinative of the instant case and is well supported by the record. In the Court below the Department of Justice relied upon evidence that NBC was a large corporation (capability) and that Spokane was a city of substance which NBC desired to enter (incentive) as its proof of that—absent this merger—NBC was still a potential entrant into Spokane. The Comptroller claimed that regardless of size NBC was not legally free to enter, and even if it were, it was not reasonably probable that such entry would be made by means other than the proposed merger. Based on the evidence before it, the District Court found that plaintiff had failed to establish that there was a reasonable probability that NBC would enter the market in the reasonably foreseeable future or that there was any feasible alternative method by which NBC could do so (Juris. Stat., p. 30).

As indicated by the Solicitor General, NBC officials testified that entry into Spokane other than by this merger would be unprofitable and therefore would not be undertaken by NBC. Beyond this testimony the District Court considered and found that several other factors also ruled out any reasonable probability that NBC was a significant potential competitor in Spokane. These other factors included the State law prohibiting *de novo* branching, the lack of existing available banks for toehold acquisition, the absence of

economic feasibility of entry by such other means even if it were legally available, and the determination by the regulatory authority as represented by the Regional Administrator of the Comptroller's Office that it would not be appropriate to charter a new national bank in Spokane in the reasonably foreseeable future (Juris. Stat., pp. 30-34).

The Department of Justice has spelled out in ambiguous terms an elaborate scheme for using the national banking system to override State statutes restricting branching.[6] The location restrictions of these State statutes, however, are incorporated into federal law governing branching by national banks. 12 U.S.C. §36. See generally, *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). In this manner, competitive equality is maintained between the national and state banking systems, insofar as growth through branching is concerned. Unless the Department of Justice is prepared to argue that Washington State's restrictive branching statute is inherently anticompetitive and thus void as being in conflict with federal antitrust laws, or that na-

[6] The Department of Justice concedes in this case that State bank branching law (RCW 30.40.020) prohibits NBC from establishing a *de novo* branch in Spokane, and that newly chartered State banks cannot be sold for 10 years without consent of the State supervisor (RCW 30.08.020). This latter statute reflects the State's policy that its restrictions on branching may not be avoided by chartering State banks for purpose of sale (Tr. 562-565). However, appellant asserts in a generalized way that these State regulatory statutes are meaningless. A national bank, the Department of Justice claims, may obtain a branch in a forbidden area by assisting in the application for charter and the organization of a new national bank, affiliating that new national bank through stock ownership, and then acquiring it as a branch.

tional banks are for some reason not restricted by these State statutes, then the Department must concede that its sought for potential *de novo* entry by NBC into Spokane would be unlawful.

On the other hand, even if appellant's scheme is found to be lawful after a consideration of the State's branching laws (as well as its prohibitive holding company act)[7] the Court would still be called upon to determine that the Comptroller would grant a charter in furtherance of such a design, and that the economic factors would favor this method of entry as a matter of economic feasibility.

It was unnecessary for the District Court to reach these issues of branching law because it found, as a factual matter, that NBC would not enter Spokane even if legally permitted to do so (Juris. Stat., p. 31). A primary basis underlying this conclusion was the Court's determination that a new national bank would not be chartered in Spokane, now or in the reasonably foreseeable future (Juris. Stat., p. 32). This determination is founded on the testimony of an official of the Office of the Comptroller of the Currency, the Regional Administrator of National Banks for the five state 13th National Bank Region. The Regional Administrator testified that he would not recommend granting a charter application in Spokane. He based his testimony upon knowledge of the Spok-

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[7] RCW 30.04.230. This statute has never been judicially construed but would clearly prohibit a holding company like Marine Bancorporation from "controlling" more than 25 percent of the stock of another bank. This statute might prohibit any "affiliate" relationship necessary under Justice's scheme. Federal law seems to defer to such state statutes. See Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846.

ane banking market obtained from visits and reports concerning competition, growth, and economics of the Spokane market (Tr., 974, 996).[8] There is no need for a new bank in Spokane because the number of banking institutions in Spokane is adequate. Thus, appellant's scheme to enter Spokane via a "sponsored affiliate" involves not only an overriding of state law but also an unreasonable assumption that a new bank could be chartered (Tr. 974). In fact, as appellant did not show any likelihood that a charter would be granted in Spokane, the Regional Administrator's testimony is the only evidence before the District Court and was thus appropriately given "great weight" (Juris. Stat., p. 32).[9]

The Regional Administrator did not testify, as represented in the Jurisdictional Statement, "that he would not recommend approval of the acquisition of a smaller bank" (Juris. Stat., p. 18). Instead, the import of his testimony was that, recognizing the existence of the restrictive state branching law, schemes

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[8] In *United States* v. *First National Bancorporation, Inc.*, 329 F. Supp. 1003 (D. Colo. 1971), *aff'd mem.*, 410 U.S. 577 (1973), the District Court found testimony of the Regional Administrator that he would not recommend a charter be granted in Greeley, Colorado, was "objective evidence" to support the finding that First National Bancorporation was not a potential entrant. 329 F. Supp. at 1015.

[9] Appellant argues that the Comptroller could not deny a charter application in Spokane unless his approval would affect the soundness of a bank already in the market (Juris. Stat., p. 18). This argument is in no way consistent with the vast discretion conferred upon the Comptroller by Congress (see 12 U.S.C. §§ 21-27) and has been summarily rejected by this Court in *Camp* v. *Pitts*, 93 S.Ct. 1241 (1973), wherein the Comptroller denied a charter application because he was "unable to reach a favorable conclusion as to the need factors."

urged by appellant for NBC's entry into Spokane were in effect *de novo* entry not permitted by State law or were tantamount to circumvention of State law and would not be accepted (Tr. 975-978).

Finally, the appellant's contentions that the Regional Administrator's testimony was "not convincing" because he was stating only "what he would recommend, not what the Comptroller would decide," seems inconsistent with its simultaneous suggestion that his testimony reflected the Comptroller's views rather than his own.[10]

As shown above, the District Court's finding that NBC was not a significant potential entrant is amply supported by the evidence. As entry into Spokane ". . . is, of course, wholly a matter of governmental grace," *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 367 n. 44 (1963), the Regional Administrator's testimony is entitled to great weight and goes a long way toward resolving the issue of entry.

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[10] In setting forth its version of the background of the Comptroller's approval, the Jurisdictional Statement cites in a footnote six documents—four of which (F-3, 10, 11 and 19) are not in evidence (Juris. Stat., p. 18, n. 11) (Tr., pp. 582, 1020).

The Jurisdictional Statement also cites other documents which were specifically rejected by the District Court:

Document	*Cited in Juris. Stat.*	
F-14	Page 6	Rejected, Tr. 593
G-5	Page 17 (Fn. 10)	Rejected, Tr. 606
G-6	Page 17	Rejected, Tr. 606
G-10	Page 17	Rejected, Tr. 610
F-21	Page 17, 19	Rejected, Tr. 595

Additionally, Appellee Comptroller is unable to verify that the deposition of Philip H. Stanton, president of Washington Trust, (Juris. Stat., p. 6, n. 3(a)) was ever accepted into evidence.

The finding by the District Court that "it is not reasonably probable" that a new national bank charter would be granted in Spokane (Juris. Stat., p. 32) is well supported by the evidence and there is no need for this Court to undertake appellant's suggested plenary review of the evidence.

(2) In Any Event, The District Court's Finding That The Alleged Anticompetitive Effects Of This Merger Are Clearly Outweighed By Its Effect In Meeting The Convenience And Needs Of The Community Has Not Been Seriously Attacked On Appeal And Requires Affirmance Of The Judgment Below.

In Section 7 Clayton Act cases involving banks, the Bank Merger Act of 1966 (12 U.S.C. §1828(c) (5)) provides as an affirmative defense that a merger otherwise prohibited on anticompetitive grounds may nevertheless be approved when the anticompetitive effects are clearly outweighed in the public interest by the merger's probable effect in meeting the convenience and needs of the community to be served. The trial court must correctly determine the anticompetitive effects in order to properly weigh the public interest benefits against them. *United States* v. *Third National Bank in Nashville,* 390 U.S. 171, 183 (1968). In undertaking such a weighing in the instant case, the District Judge assumed *arguendo* all anticompetitive effects alleged by the Department of Justice and weighed against them the procompetitive effects proven by the Comptroller. The resultant finding by the District Court in favor of the Comptroller is well supported by the record and is an independent ground for affirmance by this Court.

Procompetitive benefits are a proper consideration "in determining the 'convenience and needs of the community' under the Bank Merger Act." *United*

States v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 367 (1970). Undoubtedly, where, as here, the procompetitive gains from "better banking service" outweigh any "anticompetitive detriment and the merger was essential to secure this net gain to the public interest, the merger should be approved." *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 188-189 (1968). Appellant nevertheless argues the District Court's conclusion that the merger would be procompetitive is "legally unsound" (Juris. Stat., p. 21).

In approving this merger the Comptroller relied extensively on the resulting benefits to the convenience and needs of the community to be served (P.T.O. I, Exh. A). In their competitive reports the Department of Justice, the Federal Reserve Board and the F.D.I.C. restricted their comments to the anticompetitive factors as they saw them (id., Exhs. B, C & D)[11] (See p. 7, *supra*) and did not discuss convenience and needs.

The Comptroller found, *inter alia*, that the merger would serve the public interest of the Spokane area by bringing in an alternative source of sophisticated banking services and by promoting competition among financial institutions. He found the merger would provide a source of larger credits to Spokane for the benefit of potential borrowers and another source of broad range banking services to all in the area. Included in these services were agricultural and mining loans, student loans, economic opportunity loans, low income housing lending, SBA loans and "turnkey"

[11] Pursuant to the Bank Merger Act these reports consider only "competitive factors" 12 U.S.C. 1828(c)(4), and are expressly so limited.

low cost housing construction loans for the elderly. FHA and VA mortgage lending, which Washington Trust does not now offer its customers, also would be provided. NBC would bring to Spokane considerable expertise in international banking through its large international banking department with offices in Hong Kong, Singapore, London, Tokyo and New York City. The Comptroller concluded that "the enhanced competition that this merger will produce will contribute to the convenience and needs of bank customers in Spokane" (P.T.O. I, Exh. A).

At trial the Comptroller called thirteen witnesses, including his Regional Administrator.[12] These witnesses, made up of business people and consumers of banking services in Spokane, were called to show and did show the need for a competitive source of banking services of the nature described in the Comptroller's opinion. For example, the fact that this merger would give the Federal Intermediate Credit Bank of Spokane access to a competitive source of the large credits it needs enabled its president to negotiate a larger line of credit with his present bank (Tr. 670-671). Also, one of the few remaining independent sawmill operators in the vicinity, all of whom look to Washington Trust for financing, testified that for his mill to continue to compete effectively he needed to have an adequate source of credit. This firm recently sought to borrow more money than Washington Trust could legally loan. The need to search for an alternative and ultimately more

[12] Plaintiff argues that the Comptroller is attempting to weigh procompetitive effects in "submarkets" against the overall anticompetitive effect in commercial banking. However, it is the totality of these procompetitive effects resulting in "better banking" for the people of Spokane which outweighs the alleged anticompetitive effects.

costly source resulted in operations being curtailed (Tr. 622-632). The testimony of such witnesses provides uncontradicted direct evidence supporting the Comptroller's conclusion that the merger is procompetitive.

Other testimony established that there is no alternative method to bring these benefits to Spokane (Tr. 978) and that such procompetitive aspects of the merger would benefit the entire community. Thus, economist Dr. Charles F. Haywood testified (Tr. 376):

> My conclusion is that you would get a much greater procompetitive effect by NBC coming in through the acquisition of Washington Trust than through the other means that have been suggested.

Entry through acquisition of a unit or toehold bank in Spokane is not an adequate alternative. Without a branch system to provide a deposit base, NBC could not become a significant competitive force in Spokane. This is borne out by the testimony of plaintiff's witness, Robert K. Hurni, Senior Vice President of Pacific National Bank, who explained that his experience with only two branches in the area was "disappointing." Because of costs involved he could not justify additional personnel to allow a greater competitive effort (Tr. 1133-1136).

Appellant suggests that such procompetitive benefits are not of great competitive significance since "they are used by only a small percentage of the commercial bank customers" in the Spokane community (Juris. Stat., p. 22). However, as Dr. Nevins Baxter explained during the trial:

> The economic system is a circle. If businesses can get better international banking services or

larger loans, it follows that a direct result will be more investment and increased employment. The increase in competition goes across the range of all banking services which are offered to all banking customers, and all banking customers benefit from the general growth of the economy (Tr. 1066-67).

Unlike the merger held unlawful in *Philadelphia National Bank, supra,* this merger does not involve tangible negative effects on competition such as the elimination of a direct competitor or a measurable increase in market shares by large banks. The allegations in this case relate only to possible future changes in the market. In the instant case the procompetitive effects of this acquisition have been established by direct evidence as well as expert testimony and the testimony of the Regional Administrator. Weighing the facts of convenience and needs as found, against the anticompetitive effects, as alleged, the District Court properly concluded that said effects are clearly outweighed in the public interest by the probable procompetitive effects of the transaction in meeting the convenience and needs of the community to be served (Juris. Stat., p. 36).

D. CONCLUSION

If the appeal is not dismissed, the judgment of the District Court should be affirmed for the reasons set forth above.

MOTION TO ADVANCE

The Comptroller, after an extensive investigation including a fact-gathering public hearing, approved this merger on September 24, 1971. On October 22, 1971, this suit was filed. On January 31, 1973, more than 16 months later, the District Court rendered judg-

ment upholding the Comptroller's approval. The Jurisdictional Statement was not filed until June 30, 1973.

During this extended period following the Comptroller's approval the automatic stay provision of the Bank Merger Act of 1966 [12 U.S.C. § 1828(c)(7)(A)] has held up these two banks' progress toward the public benefits determined to flow from the proposed merger. The people of the Spokane area have been denied the substantial procompetitive aspects of this merger which would quickly follow its consummation. To minimize the continuing denial of these benefits to the Spokane community it is imperative that this matter be quickly settled.

It is respectfully requested, if the appeal is not dismissed or if the judgment of the District Court not affirmed, this case be scheduled for early argument.

Respectfully submitted,

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